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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92046037
Party	Plaintiff Bryan Corporation Bryan Corporation
Correspondence Address	Daniel G. Jarcho/Andrew J. Park McKenna, Long & Aldridge, LLP 1900 K Street, N.W. Washington, DC 20006 UNITED STATES apark@mckennalong.com
Submission	Motion for Sanctions
Filer's Name	Thomas G. Southard
Filer's e-mail	tsouthard@mckennalong.com, djarcho@mckennalong.com, apark@mckennalong.com
Signature	/tgs/
Date	10/14/2008
Attachments	Cover001.PDF (1 page)(23736 bytes) Bryan001.PDF (52 pages)(1395068 bytes) DC-#50579575-v1-Exhibits_E-G.PDF (34 pages)(868382 bytes)

Albany
Atlanta
Brussels
Denver
Los Angeles

McKenna Long
& Aldridge LLP
Attorneys at Law

1900 K Street, NW • Washington, DC 20006-1108
Tel: 202.496.7500 • Fax: 202.496.7756
www.mckennalong.com

New York
Philadelphia
Sacramento
San Diego
San Francisco
Washington, D.C.

THOMAS G. SOUTHARD
(202) 496-7259

EMAIL ADDRESS
tsouthard@mckennalong.com

October 14, 2008

BY ELECTRONIC FILING

Trademark Trial and Appeal Board
United States Patent and Trademark Office
600 Dulany Street
Madison East, Concourse Level, Room C-55
Alexandria, VA 22313-1451

Re: Cancellation Number 92046037
Bryan Corporation v. Novatech SA
Our Ref.: 25114.0008

Dear Sir/Madam:

We have attached for filing the following papers: (i) Petitioner Bryan Corporation's Motion for Sanctions (with Exhibits A-G); (ii) Bryan Corporation's Response in Opposition to Novatech SA's Motion for Summary Judgment Dismissing This Cancellation Proceeding (with Exhibits A-E). Please feel free to contact the undersigned if you have any questions. We appreciate your assistance.

Sincerely,

Thomas G. Southard

cc: John S. Egbert, Esq. (via mail)
TGS:py
Encls.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Registration No. 3,093,389
Registered May 16, 2006

BRYAN CORPORATION, Petitioner, v. NOVATECH SA, Registrant.	)	Cancellation No. 92046037

PETITIONER BRYAN CORPORATION'S MOTION FOR SANCTIONS

Pursuant to 37 C.F.R. §2.120(g), and the Board's inherent authority, Bryan Corporation ("Bryan") moves for an order sanctioning Novatech SA ("Novatech") for its failure to comply with the August 29, 2008, discovery Order, and for Novatech's continued delay and pattern of evasiveness in providing discovery relating to Bryan's fraud claim. Well-established sanctions principles dictate that Novatech should be penalized as to the fraud claim it has attempted to avoid. Accordingly, Bryan requests that judgment be entered against Novatech on the fraud claim. As grounds for this motion, Bryan states the following:

1. Both parties to this proceeding agree that Novatech's liability on Bryan's fraud claim turns on Novatech's intent when it submitted its declaration to the U.S. Patent & Trademark Office and represented that it believed itself "entitled to use" the STERITALC mark in commerce, and that no other party had "the right to use the same or similar mark on the same or similar goods in commerce." Petition for Cancellation at ¶11 (Ex. A hereto). In particular, the fraud claim turns on whether Novatech knew or should have known that statement was false,

given that Novatech lacked FDA approval for its STERITALC product and therefore could not market it legally in United States commerce.

2. On November 10, 2006, Bryan served Interrogatory No. 5 on Novatech, which addressed this central element of intent. Interrogatory No. 5 reads as follows: "State whether your belief that you are "entitled to use the STERITALC mark in commerce, as set forth in the Declaration you signed in connection with your application Serial No. 79/008,374, means that on the date of the Declaration you believed you have the right to sell a drug that bears the name STERITALC in U.S. commerce." *See* Interrogatory No. 5 (Ex. B hereto).

3. For the past two years, Novatech has tried to sidestep providing a response to this interrogatory. First, on December 13, 2006, Novatech filed an utterly baseless objection to this interrogatory, stating that it called for a legal conclusion and privileged attorney-client information. *See* Novatech's Response to Bryan's Second Set of Interrogatories, Interrogatory No. 5 (Ex. C hereto). Furthermore, instead of providing an answer, Novatech also stated that the "STERITALC mark was filed under 66(a) as an international application," almost as if the declaration it had signed had no significance. *Id.*

4. Novatech's refusal to provide a real response forced Bryan to file a motion to compel. On October 3, 2007, the Board granted that motion, stating that Novatech's "objection to the interrogatory as calling for a 'legal conclusion' was overruled." October 3, 2008 Order at 12 (citing *Johnston Pump/General Valve Inc. v. Chromalloy American Corp.*, 10 USPQ2d 1671, 1676 (TTAB 1989)) (Ex. D hereto).

5. On November 5, 2007, Novatech responded to the Order with an entirely circular answer that did not respond to the question: "Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for information that is

protected by the Attorney/Client privilege. Without waiving these objections or any others, the STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration. Registrant signed a Declaration in connection with application Serial No. 79/008,374. The Declaration meant that Registrant "believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive." Registrant relies solely on the statement as it is written in the Declaration contained within the application." *See* Registrant's Supplemental Answers to Petitioner's Second Set of Interrogatories at 4 (Ex. E hereto). In other words, Novatech essentially responded that the declaration speaks for itself, and provided no discovery on the critical issue of intent.

6. Without providing a meaningful response to the interrogatory it was ordered to answer, Novatech filed a Motion for Summary Judgment just three weeks later, requesting summary judgment on the issue of fraud. Because Bryan did not have the information it needed to respond to that motion, this forced Bryan to file another motion to compel.

7. The Board granted Bryan's second motion to compel on August 29, 2008 ("Order II") (Ex. F hereto). In its second Order, the Board admonished Novatech, stating that it was wrong for Novatech to *"essentially interpret the interrogatory as invalid and on that basis refuse to provide a real response to the question posed, after being ordered to serve a response."* Order II at 6-7 (emphasis added). The Board's order acknowledged that Interrogatory no. 5 was "specific and focused" and that Novatech had already been ordered to respond, and failed to do so. *Id.*

8. In granting Bryan's second motion to compel, the Board clearly set out its expectations for Novatech's response. The Board stated: "To answer the question posed in the interrogatory, respondent must indicate whether it believed, on the date it signed the declaration in question, that it 'had the right to sell a drug that bears the name STERITALC in U.S. commerce.' It must provide this answer without citing, referring to or quoting its declaration, except that respondent may cite the date on which the declaration was filed. If, as last time, respondent believes the interrogatory is "erroneous," improper, confusing or unclear in any way, it may not so state in its supplemental response, but must instead initiate a telephone conference with petitioner and the Board to discuss any issues it has with the interrogatory, well prior to the deadline for responding to it." Order II at 7-8

9. It is significant in this case that the Board's August 29 Order also expressly admonished Novatech that an insufficient response would be a basis for sanctions: "Serving a supplemental response which, like the last one, questions the basis or substance of the interrogatory or refuses to answer the question posed is not permitted and will be grounds upon which petitioner may file a motion for sanctions." Order II at 8 (emphasis added).

10. Novatech, on September 15, 2008, supplemented its answer to Interrogatory no. 5 with verbiage relating to objections and a one-word substantive answer: "yes." *See* Registrant's Second Supplemental Answers to Petitioner's Interrogatories at 4 (Ex. G hereto). This answer is wholly inadequate because of the "verification" that accompanied the Company witness's signature. That "verification" was not under oath as is expressly required by Fed. R. Civ. P. 33(b)(3). Given the two Board Orders that have been issued on this single interrogatory, there is absolutely no excuse for submitting a response that is not under oath.

11. Furthermore, Novatech's "verification" was in fact a set of qualifiers that wholly undermined the answer's evidentiary value. For example, the "verification" stated that the answer was "subject to inadvertent or undiscovered errors"; "based on and therefore necessarily limited by the records and information still in existence, presently recollected, and thus far discovered"; and subject to change "if it appears at any time that omissions or errors have been made therein." *See* Ex. G (Verification page). Given the length of time in which it had to respond to this interrogatory, and the multiple orders it was under, Novatech very easily could have provided Bryan with a verification that did not seek to limit the evidentiary value of the answer. *See Alexander v. F.B.I.*, 192 F.R.D. 50, 52-53 (D.D.C. 2000) (statement that entity compiled its answers from its own records, but that it could not warrant the accuracy of the information provided, was inadequate verification).

12. Novatech's disregard for the Board's authority demonstrates an intent to obstruct applicant's receipt of information that the Board had already determined is discoverable in this proceeding. *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848 (TTAB 2000); *UnicutCorp. v. Unicut, Inc.*, 222 USPQ 341 (TTAB 1984); and TBMP Section 527.01.5. Unless remedied, this will continue to provide Novatech with "convenient avenues of evasion." *Nagler v. Admiral Corp.*, 167 F.Supp. 413 (S.D. N.Y. 1958); 4A Moore's Federal Practice, 33.25[1].

13. Sanctions are appropriate here because Novatech's circumvention of the discovery process goes to the heart of, and threatens to compromise, the Board's factfinding process regarding the fraud claim. This was not just any interrogatory that Novatech has attempted to avoid. It is an interrogatory that goes to the state of mind of Novatech, and in particular to the state of mind of Bruno Ferreyrol, the witness who signed the Declaration at

issue in the fraud claim. This very same witness is the person who signed the qualified interrogatory "verification" that was not under oath. Sanctions are necessary here to police the integrity of the Board's proceedings. To hold otherwise would be to permit an applicant to submit a fraudulent declaration and then play games with the discovery process that seeks to uncover that fraud.

14. Under Trademark Rule 2.120(g)(1), if a party fails to comply with a Board order compelling discovery, the Board may order appropriate sanctions as defined in that rule and in Fed. R. Civ. P. 37(b)(2), including entry of judgment. *See MHW Ltd. v. Simex, Aussenhandelsgesellschaft Savelsberg KG*, 59 USPQ2d 1477 (TTAB 2000); TBMP Section 527.01(a) (2d ed. rev. 2004). The full list of sanctions includes striking of all or part of the pleadings of the disobedient party; refusing to allow the disobedient party to support or oppose designated claims or defenses; prohibiting the disobedient party from introducing designated matters in evidence; and entering judgment against the disobedient party, as noted above. *See* TBMP Section 527.01(a)(2d ed. rev. 2004).

15. In the context of this Motion, all of these potential sanctions embody the same principle -- the Board should curtail Novatech's ability to defend against the fraud claim because it has abused the discovery process with respect to that claim. The first sanction -- striking pleadings -- would have no real meaning at this stage of the proceedings. Furthermore, in the context of this motion, the second and third sanctions (refusing to allow Novatech to oppose the fraud claim and prohibiting Novatech from introducing evidence as to the fraud claim) would have the same practical result as the final sanction: entry of judgment against Novatech on the fraud claim. Accordingly, Bryan respectfully requests the Board to enter judgment against Novatech on the fraud claim as a sanction for its discovery abuse.

CONCLUSION

For the foregoing reasons, Bryan respectfully requests that the Board grant this motion by entering judgment against Novatech on Bryan's fraud claim.

Respectfully submitted,

Daniel G. Jarcho

Dated: October 14, 2008

Daniel G. Jarcho, Esq.
Andrew J. Park, Esq.
Thomas G. Southard, Esq.
MCKENNA LONG & ALDRIDGE, LLP
1900 K St. NW
Washington, DC 20006

Attorneys for Petitioner Bryan Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2008, a copy of the foregoing Motion for Sanctions were served, by first class mail, postage prepaid, upon:

John S. Egbert, Esq.
Egbert Law Offices
State National Building
412 Main Street
7th Floor
Houston, TX 77002

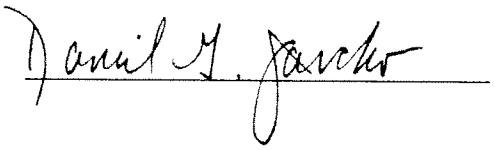


EXHIBIT A

Trademark Trial and Appeal Board Electronic Filing System. http://estta.uspto.gov

ESTTA Tracking number: **ESTTA89350**

Filing date: **07/11/2006**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Bryan Corporation		
Entity	Corporation	Citizenship	Massachusetts
Address	4 Plympton Street Woburn, MA 01801 UNITED STATES		

Correspondence information	Daniel G. Jarcho/Andrew J. Park Attorney McKenna, Long & Aldridge, LLP 1900 K Street, N.W. Washington, D.C., DC 20006 UNITED STATES apark@mckennalong.com Phone:202-496-7442

Registration Subject to Cancellation

Registration No	3093389	Registration date	05/16/2006
International Registration No.	NONE	International Registration Date	NONE
Registrant	NOVATECH SA Voie Antiope, ZI ATHELIA III F-13600 LA CIOTAT FRANCE		
Goods/Services Subject to Cancellation	Class 005 Goods/Services: Pharmaceutical products containing talcum powder, namely, pharmaceutical preparations containing talcum powder for the treatment of malignant pleural effusions, pneumothorax, mesotheliama, skin disorders, cancer, and gout; sanitary products containing talcum powder, namely, sanitary pads, sanitary napkins, and sanitary preparations for medical use all containing talcum powder; talcum powder for medical use, namely, medicated talcum powder		

Attachments	BRYAN.PETITION FOR CANCELLATION.PDF (8 pages)(194803 bytes)

Signature	/ajp/
Name	Andrew J. Park
Date	07/11/2006

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Registration No.
3,093,389 Registered May 16, 2006

BRYAN CORPORATION,	)	
	)	
Petitioner,	)	
	)	Cancellation No.
v.	)	
	)	
NOVATECH SA,	)	
	)	
Registrant.	)	
	)	

PETITION FOR CANCELLATION

Bryan Corporation ("Petitioner"), a corporation organized under the laws of Massachusetts, with an office and principal place of business at 4 Plympton Street, Woburn, MA, hereby petitions to cancel Registration No. 3,093,389 pursuant to 15 U.S.C. § 1064 et seq. and 37 C.F.R. § 2.111 et seq.

Petitioner alleges the following as grounds for cancellation:

1. Petitioner is engaged in the development, manufacture, and sale of medical devices and drug products. This matter involves Petitioner's drug product STERILE TALC POWDER, which is a sclerosing agent for the prevention of recurrent malignant pleural effusion ("MPE"), using talc powder as the active ingredient (hereinafter "the Product"). The United States Food and Drug Administration ("FDA") has determined that under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 et seq., this type of product used to treat MPE cannot be distributed in interstate commerce without prior approval by FDA.

2. Petitioner secured FDA approval for STERILE TALC POWDER on December 15, 2003. By its terms, such approval authorized both the use of the name STERILE TALC POWDER for the Product and the distribution of that Product in interstate commerce.

3. On information and belief, Petitioner is the only company to have obtained FDA approval for a drug product that is a sclerosing agent for the prevention of recurrent MPE, using talc powder as the active ingredient. On information and belief, Petitioner also is the only company to have obtained FDA approval for the use of the name STERILE TALC POWDER for a drug product. The name of a drug product is part of the FDA-regulated labeling requirements and must be approved by the FDA prior to use.

4. The name of a drug product is part of the FDA-regulated labeling requirements and must be approved by the FDA prior to use. The FDA vigorously and strictly regulates the use of drug product names. In assessing the permissibility of a prospective drug name, the FDA will, among other things, (1) check for similarity to any prior FDA-approved drug name; and (2) consider the prospective drug name with the nature of the drug to ensure that it is not misleading as to the nature of the drug, its efficacy, or its ingredients.

5. Petitioner initially sought FDA approval for the name TALC POWDER but upon consideration, the FDA demanded Petitioner use the name STERILE TALC POWDER instead since the active ingredient - talc powder - is sterilized. Accordingly, since the FDA not only approved, but insisted on the use of the name STERILE TALC POWDER for Petitioner's FDA-approved Product, the name is (1) dissimilar to the name of any other third-party's FDA-approved drug product, particularly a drug product that is a sclerosing agent for the prevention of

MPE using talc powder; and (2) it is not misleading in any manner vis-à-vis the nature of the drug.

6. It is unlikely for any third-party to obtain FDA approval for the name of a drug that is identical or similar to the name STERILE TALC POWDER for drugs that are identical or similar to Petitioner's Product. Thus, it is unlikely for Registrant to obtain FDA approval for the name STERITALC for the drug products claimed by its trademark registration since it is similar to Petitioner's FDA-approved STERILE TALC POWDER mark and it is used on drug products that are similar to Petitioner's Products.

7. Petitioner has obtained common law intellectual property rights to the STERILE TALC POWDER mark through its exclusive, continuous, and extensive use in commerce throughout the United States in connection with the Product, and as a result, the mark is famous and well-known as the source identifier of Petitioner's FDA-approved Product.

8. On March 21, 1996, Registrant, a French company, filed U.S. application Serial No. 75/076,198 for registration on the Principal Register for the mark STERITALC for "Pharmaceutical products containing powder" (later amended to "Pharmaceutical products for the treatment of pulmonary ailments, namely aerosols and flasks containing talc as an active ingredient") in International Class 005. This application was based on intent-to-use and eventually matured into U.S. Reg. No. 2,116,833 on November 25, 1997.

9. On August 28, 2004, Registrant's U.S. trademark Reg. No. 2,116,833 was canceled for failure to file an affidavit of continued use.

10. On December 28, 2004, Registrant once again sought U.S. registration for the STERITALC mark by filing a new application with the PTO. The new U.S. application Serial

No. is 79/008,374. This application was based on Registrant's International Registration for the STERITALC mark ("Section 66(a) application"). The Section 66(a) application claimed "Pharmaceutical products containing talcum powder, namely pharmaceutical preparations containing talcum powder for the treatment of malignant pleural effusions, pneumothorax, mesotheliama, skin disorders, cancer, gout; sanitary products containing talcum powder, namely sanitary pads, sanitary napkins, sanitary preparations for medical use all containing talcum powder; talcum powder for medical use, namely medicated talcum powder" ("Re-filed mark"). The Section 66(a) application for the Re-filed mark eventually matured to registration on May 16, 2006.

11. In support of the registration of the Re-filed mark, Registrant executed and submitted a declaration that stated, among other things that (a) it believes it is entitled to use the STERITALC mark in commerce; and (b) it believes, to the best of its knowledge and belief, that no other third party has the right to use the same or similar mark on the same or similar goods in commerce.

12. On information and belief, if FDA were notified of Registrant's intent to distribute its pharmaceutical products in interstate commerce, and of Registrant's intent to do so using the STERITALC name for the products, FDA would determine that such distribution of products and use of the name require FDA approval. On information and belief, Registrant has not obtained FDA approval to distribute its pharmaceutical products in interstate commerce. On information and belief, Registrant has not obtained FDA approval to use the name STERITALC for its pharmaceutical products.

13. Registrant procured registration of the Re-filed mark by false means and/or by knowingly and willfully making false and/or fraudulent declarations or representations to the PTO, including, *inter alia*, falsely alleging in a Declaration that Registrant believed it was entitled to use the mark in commerce, when Registrant did not then and still has not obtained approval from FDA to distribute its product in commerce or to use the name STERITALC. On information and belief, said false statements were made with the intent to induce the PTO to grant said registration, and reasonably relying upon the truth of said false statements, the PTO did, in fact, grant said registration to Registrant on May 16, 2006.

14. Since at least December 15, 2003, Petitioner has been manufacturing, marketing and selling its FDA-approved Product continuously and extensively in interstate commerce under the trademark STERILE TALC POWDER.

15. Petitioner has spent substantial amounts of time, money and effort to develop, test, and market its FDA-approved Product. On information and belief, there is no other FDA approved product sold in the United States that is a sclerosing agent for the prevention of recurrent MPE using talc powder as the active ingredient, with the exception of another related but different FDA-approved product also developed, marketed and sold by Petitioner called "Sclerosol." Further, on information and belief, there is no other FDA approved product sold in the United States under the name STERILE TALC POWDER or a similar name. As a result, Petitioner's Product and its mark STERILE TALC POWDER have become famous and well-known and, specifically, the mark STERILE TALC POWDER has become famous and well-known as the source identifier of Petitioner's FDA-approved Product.

16. On information and belief, Registrant has not obtained FDA approval authorizing the sale of any of its products under the STERITALC mark in the United States. Therefore, Petitioner has priority of use and common law rights to the STERILE TALC POWDER mark that are senior to Registrant's registration of the STERITALC mark.

17. Registrant's STERITALC mark is nearly identical to Petitioner's STERILE TALC POWDER mark in terms of appearance, pronunciation and meaning.

18. Registrant's STERITALC registration claims goods that are the same or similar to Petitioner's FDA-approved Product, the channels of trade are the same or similar, and they are targeted to the same potential purchasers in the medical community and the general public.

19. Petitioner's Product is the only FDA-approved drug, and its name, STERILE TALC POWDER, together with the related Petitioner product called Sclerosol, are the only FDA-approved product names for a sclerosing agent for the prevention of MPE using talc powder as the active ingredient.

20. The similarity in appearance, pronunciation and meaning of Registrant's STERITALC mark to Petitioner's FDA-approved STERILE TALC POWDER mark, and the similarity of the respective products, channels of trade, and intended consumers make it likely that, when Registrant's mark is applied to Registrant's products, it will cause confusion and mistake, in particular, it will cause consumers to wrongly believe that Registrant's product is an FDA-approved drug when it is not and it will deceive as to the source, origin, or sponsorship of Registrant's goods, with consequent injury to Petitioner and to the patient population taking these pharmaceutical products.

21. Petitioner is likely to be damaged by the registration of Registrant's STERITALC mark because such registration will support and assist Registrant in the confusion and misleading use of Registrant's mark and will give color of rights in Registrant in violation of the superior rights of Petitioner.

22. In view of the above allegations, Registrant is not entitled to continue registration of its mark since Registrant, upon information and belief, obtained the registration through misrepresentation and fraud and the subject registration is likely to cause confusion and mistake and to deceive as to the source, origin, or sponsorship of Registrant's products.

WHEREFORE, the Petitioner respectfully prays that Registration No. 3,093,389 be canceled.

Respectfully submitted,

Dated: July 11, 2006

Daniel G. Jarcho
Andrew J. Park
Attorneys for Petitioner

McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7000
(202) 496-7756 fax

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Registration No.
3,093,389 Registered May 16, 2006

BRYAN CORPORATION,	)	
	)	
Petitioner,	)	
	)	Cancellation No.
v.	)	
	)	
NOVATECH SA,	)	
	)	
Registrant.	)	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITION FOR CANCELLATION** was served on Registrant by mailing a true copy thereof to the attorney of record via overnight carrier addressed as follows:

John S. Egbert, Esq.
Egbert Law Offices
State National Building
412 Main Street, 7th Floor
Houston, Texas 77002

this 11th day of July, 2006.

Andrew J. Park, Esq.
Attorney for Bryan Corporation, Petitioner

McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500
(202) 496-7756 fax

EXHIBIT B

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Registration No.
3,093,389 Registered May 16, 2006

BRYAN CORPORATION,	)	
	)	
Petitioner,	)	
	)	Cancellation No. 92046037
v.	)	
	)	
NOVATECH SA,	)	
	)	
Registrant.	)	

PETITIONER'S SECOND SET OF INTERROGATORIES TO REGISTRANT

Petitioner, Bryan Corporation (hereinafter "Petitioner"), hereby serves Registrant, Novatech SA (hereinafter "Registrant"), with the following Interrogatories to be answered in writing and under oath within thirty (30) days of service hereof in accordance with 37 C.F.R. §2.120 and Rule 33 of the Federal Rules of Civil Procedure.

DEFINITIONS AND INSTRUCTIONS

A. The terms "Registrant," "you" and "your(s)" refer to the Registrant, as well as any subsidiary, parent organization, licensee or sub-licensee of Registrant, or any agents acting or purporting to act on Registrant's behalf.

B. "Each" means each and every.

C. "Any" means any and all.

D. "And" and "or" each shall be construed both conjunctively and disjunctively to bring within the scope of the request all responses that might otherwise be construed to be outside its scope; in other words, to give each request its broadest possible meaning.

E. The term "relating to" means concerning, referring to, describing, evidencing, constituting, or otherwise relating in any way to the subject matter with respect to which the term is used.

F. The term "persons" refers both to natural persons, whether living or not, and to corporate or other business entities such as a firm, partnership, proprietorship, association or any other organization or entity (including the Registrant); the acts of a person (including Petitioner and Registrant) are defined to include the acts of officers, employees, agents, attorneys or representatives acting on Registrant's behalf.

G. The term "document" is intended to encompass any writings, drawings, graphics, charts, photographs, recordings, computer storage media, electronic media and any other medium from which information can be obtained.

H. The term "communication" means an oral, graphic, demonstrative, telephonic, verbal, electronic, written or like conveyance of information, including documents.

I. "Identify" or "identity" used with reference to an individual means to state his or her full name and title and, if not currently employed by you, his or her present or last known address, telephone number, present or last known position and business affiliation, and employer, title, position, and job description. "Identify" or "identity" used with reference to a person other than an individual means to state that person's name, office address, telephone number, and the employee or representative of that person who was your principal contact.

J. "Identify" or "identity" used with reference to a company or other business entity means to state the legal name of the company or the business entity, the names under which it does business, its state of incorporation, its principal place of business, the states in which it is qualified to do business, its form (partnership, corporation, etc.), and to identify its beneficial owners and owners of record, principal proprietors, officers, directors and principal employees.

K. "Identify" or "identity" used with reference to a document means to state the date, author, recipient(s), type of document (e.g., letter, memorandum, telegram, chart, note, etc.), its present location or custodian, and all numbers or letters added to that document for the purposes of this litigation. If any such document is no longer in your possession or subject to your control, state what disposition was made of it.

L. "Identify" or "identity" used with reference to a communication means to state the date of the communication, whether the communication was written or oral, the identity of all parties and witnesses to the communication, the substance of what was said and/or transpired and, if written, the document(s) containing or referring to the communication.

M. In lieu of identifying a document when identification is requested, a copy of the document may be attached to your response to these Interrogatories; however, any specific information required by the definition in (K) above that is not fully set forth on the face of the attached copy must be separately provided.

N. The term "Petitioner's Mark" means Petitioner's STERILE TALC POWDER mark.

O. The term "Registrant's Mark" means the STERITALC mark which is asserted in this cancellation proceeding.

P. The term "date" means the exact day, month and year if ascertainable or if not, the best approximation thereto.

Q. Interrogatories are to be answered by Registrant in writing and under oath with such answers to be provided to Petitioner's attorneys within thirty (30) days of the date of service.

R. If Registrant objects to any interrogatory, please set forth with reasonable specificity the basis for its objection, and answer the interrogatory to the extent it is not objectionable.

S. These interrogatories should be deemed to be continuing and are to be promptly supplemented in accordance with the Federal Rules of Civil Procedure.

INTERROGATORIES

1. State whether you have ever, at any time in the past or present, sold a drug in the United States that bears the name STERITALC.

2. If you have ever sold, at any time in the past or present, a drug bearing the name STERITALC in the United States, identify the drug, state whether the drug was approved by the Food and Drug Administration (FDA), state the period of the sales, the dollar amount of the sales, the number of units of drugs sold, and identify the purchasers.

3. State whether you believe it is lawful to sell the STERITALC drug in the U.S. without FDA approval.

4. State whether the drug label you submitted as evidence of the use of the STERITALC mark in connection with application Serial No. 75/076,198 is a sample of a label that was affixed to drugs sold in U.S. commerce.

5. State whether your belief that you are "entitled to use" the STERITALC mark in commerce, as set forth in the Declaration you signed in connection with your application Serial No. 79/008,374, means that on the date of the Declaration you believed you have the right to sell a drug that bears the name STERITALC in U.S. commerce.

6. State whether your belief that you are "entitled to use" the STERITALC mark in commerce, as set forth in the Declaration you signed in connection with your application Serial No. 79/008,374, means that on the date of the Declaration you believed you possess ownership of the name STERITALC.

7. Identify and describe the facts and documents upon which you will rely to support your response to Interrogatory Nos. 6 and 7.

8. State whether it is your contention that the STERITALC mark can be used in U.S. commerce under the Lanham Act without FDA approval of the STERITALC drug.

9. If it is your contention that the STERITALC mark can be used in U.S. commerce under the Lanham Act without FDA approval of the STERITALC drug, state how the STERITALC mark can be used in U.S. commerce.

10. State whether you made any inquiry at any time prior to the filing of your application Serial No. 79/008,374 to determine whether there may be any obstacles to the FDA approval of the STERITALC drug.

11. State whether you currently have a pending FDA application for the STERITALC drug.

12. State whether you were aware, on the date you signed the Declaration in connection with your application Serial No. 79/008,374 that Bryan Corporation had an approved NDA for STERILE TALC POWDER.

13. State whether you conducted an availability search to determine if any third parties have registered and/or are using a mark in the U.S. that is the same or similar to the STERITALC mark prior to the filing date of your application Serial No. 79/008,374.

14. Identify and describe any and all correspondence between the FDA and you in connection with your April 17, 1997 FDA application and in connection with any other FDA applications for the STERITALC drug.

15. Identify and describe the facts and documents upon which you will rely to support each of your three (3) affirmative defenses to the Petition to Cancel as stated in your Answer.

16. Identify and describe the facts and documents upon which you will rely to support your denial of the allegations in Paragraph 12 of the Petition to Cancel.

Dated: November 10, 2006

Respectfully submitted,

Daniel G. Jarcho
Andrew J. Park
Attorneys for Petitioner

McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500
(202) 496-7756 fax

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Registration No.
3,093,389 Registered May 16, 2006

BRYAN CORPORATION,	)	
	)	
Petitioner,	)	
	)	Cancellation No. 92046037
v.	)	
	)	
NOVATECH SA,	)	
	)	
Registrant.	)	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITIONER'S SECOND SET OF INTERROGATORIES TO REGISTRANT** was served on Registrant by mailing a true copy thereof to the attorneys of record via overnight carrier addressed as follows:

John S. Egbert, Esq.
Egbert Law Offices
State National Building
412 Main Street, 7th Floor
Houston, Texas 77002

this 10th day of November, 2006.

Andrew J. Park, Esq.
Attorney for Bryan Corporation, Petitioner

McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500
(202) 496-7756 fax

EXHIBIT C

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Registration No. 3,093,389
Registered on: May 16, 2006

BRYAN CORPORATION,	§	
	§	
Petitioner,	§	
	§	
v.	§	Cancellation No. 92046037
	§	
NOVATECH SA,	§	
	§	
Registrant.	§	

REGISTRANT'S RESPONSE TO PETITIONER'S SECOND SET OF INTERROGATORIES

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, NOVATECH SA ("Registrant"), by its attorneys, hereby submits the following objections and responses to BRYAN CORPORATION'S ("Petitioner") Second Set of Interrogatories as follows:

GENERAL OBJECTIONS

1. Registrant objects to Petitioner's Interrogatories to the extent they seek information subject to the attorney/client privilege, or within the attorney's work product immunity, or other grounds of immunity from discovery.

2. Registrant objects to Petitioner's Interrogatories to the extent they seek information that is unreasonably cumulative, duplicative, or obtainable from some other source that is more convenient, less burdensome, or less expensive.

3. Registrant objects to Petitioner's Interrogatories to the extent that the burden or expense of the Interrogatory outweighs its likely probative value.

4. Registrant's responses are based upon information and writings presently available to and located by Registrant and its attorneys. Registrant has not completed its investigation of the facts relating to this Cancellation, its discovery in this action, nor its preparation for trial. All the information supplied is based only on such information and documents which are presently and specifically known to Registrant. Therefore, Registrant's written responses are without prejudice to its rights to supplement or amend its written responses and to present evidence discovered hereafter at any hearing or trial.

5. Registrant objects to Petitioner's Interrogatories instructions and definitions to the extent they seek to impose burdens contrary to or in addition to those provided in the Federal Rules of Civil Procedure or the Trademark Rules of Practice. Accordingly, Registrant will produce documents identified in its responses in accordance with the applicable rules.

INTERROGATORIES

1. State whether you have ever, at any time in the past or present, sold a drug in the United States that bears the name STERITALC.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Without waving these objections or any others, Registrant responds that Registrant sold aerosol STERITALC in the United States under Investigational New Drug Application (IND) procedure in 1996.

2. If you have ever sold, at any time in the past or present, a drug bearing the name STERITALC in the United States, identify the drug, state whether the drug was approved by the

Food and Drug Administration (FDA), state the period of the sales, the dollar amount of the sales, the number of units of drugs sold, and identify the purchasers.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery of this Cancellation proceeding. Without waving these objections or any others, Registrant responds that Registrant sold aerosol STERITALC in the United States under an Investigational New Drug Application (IND) procedure in 1996. Registrant used the IND procedure to sell STERITALC brand aerosol sterile talc powder with permission from the FDA Division of Oncology. The FDA allowed registrant to send hospitals two canisters of STERITALC brand aerosol sterile talc powder per patient if a physician faxed a request to the FDA. The FDA would then assign an IND number to each request. Registrant's central file number for its facilities was number 9613846. The FDA labeler code number for Registrant was No. 62327. The FDA assigned LI 0060295 as the Drug Product Listing number for STERITALC on Registrant's form FDA 2657. Registrant will supplement this interrogatory with relevant, non-privileged information responsive to this Interrogatory.

3. State whether you believe it is lawful to sell the STERITALC drug in the U.S. without FDA approval.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The interrogatory cannot be expected to yield

information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner.

4. State whether the drug label you submitted as evidence of the use of the STERITALC mark in connection with application Serial No. 75/076,198 is a sample of a label that was affixed to drugs sold in U.S. commerce.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Without waving these objections or any others, Applicant will supplement this interrogatory with relevant, non-privileged information responsive to this Interrogatory if such an answer is able to be determined.

5. State whether your belief that you are "entitled to use" the STERITALC mark in commerce, as set forth in the Declaration you signed in connection with your application Serial No. 79/008,374, means that on the date of the Declaration you believed you have the right to sell a drug that bears the name STERITALC in U.S. commerce.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration.

6. State whether your belief that you are "entitled to use" the STERITALC mark in commerce, as set forth in the Declaration you signed in connection with your application Serial No. 79/008,374, means that on the date of the Declaration you believed you possess ownership of the name STERITALC.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration.

7. Identify and describe the facts and documents upon which you will rely to support your response to Interrogatory Nos. 6 and 7.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The STERITALC mark was filed under 66(a) as an intent to use application and was based on International Registration No. 0667961.

8. State whether it is your contention that the STERITALC mark can be used in U.S. commerce under the Lanham Act without FDA approval of the STERITALC drug.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. The interrogatory calls for information that is protected by the Attorney/Client privilege. Without waving these objections or any others, Registrant responds the STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration. Registrant plans to obtain approval of the STERITALC drug by the FDA before using the STERITALC mark in U.S. commerce.

9. If it is your contention that the STERITALC mark can be used in U.S. commerce under the Lanham Act without FDA approval of the STERITALC drug, state how the STERITALC mark can be used in U.S. commerce.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. The interrogatory calls for information that is protected by the Attorney/Client privilege. Without waving these objections or any others, Registrant responds the STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration. Registrant plans to obtain approval of the STERITALC drug by the FDA before using the STERITALC mark in U.S. commerce.

10. State whether you made any inquiry at any time prior to the filing of your application Serial No. 79/008,374 to determine whether there may be any obstacles to the FDA approval of the STERITALC drug.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery. Without waving these objections or any others, Registrant responds the STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration. Registrant plans to obtain approval of the STERITALC drug by the FDA before using the STERITALC mark in U.S. commerce and expects to obtain such approval without any problems.

11. State whether you currently have a pending FDA application for the STERITALC drug.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for information that is protected by the Attorney/Client privilege. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery. Without waving these objections or any others, Registrant responds that there is not a pending FDA application for the STERITALC drug as of the date of this Answer to Interrogatories.

12. State whether you were aware, on the date you signed the Declaration in connection with your application Serial No. 79/008,374 that Bryan Corporation had an approved NDA for STERILE TALC POWDER.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery. Without waving these objections or any others, Registrant responds that it did not learn of an approved NDA for Petitioner's sterile talc powder in a vial until after its December 28, 2004 filing date for STERITALC in International Class 005.

13. State whether you conducted an availability search to determine if any third parties have registered and/or are using a mark in the U.S. that is the same or similar to the STERITALC mark prior to the filing date of your application Serial No. 79/008,374.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege.

14. Identify and describe any and all correspondence between the FDA and you in connection with your April 17, 1997 FDA application and in connection with any other FDA applications for the STERITALC drug.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery. Without waving these objections or any others, please refer to Registrant's Responses to Petitioner's Second Set of Requests for Production.

15. Identify and describe the facts and documents upon which you will rely to support each of your three (3) affirmative defenses to the Petition to Cancel as stated in your Answer.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. Also, The interrogatory is an improper attempt to require Registrant to list all factual assertions or contentions in this case, marshal all of its available proof, or marshal all proof Registrant intends to offer.

16. Identify and describe the facts and documents upon which you will rely to support your denial of the allegations in Paragraph 12 of the Petition to Cancel.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. Also, The interrogatory is an improper attempt to require Registrant to list all factual assertions or contentions in this case, marshal all of its available proof, or marshal all proof Registrant intends to offer.

Respectfully submitted,

12.13.06
Date

John S. Egbert
Reg. No. 30,627
Egbert Law Offices
412 Main St., 7th Floor
Houston, Texas 77002
(713)224-8080
(713)223-4873 fax

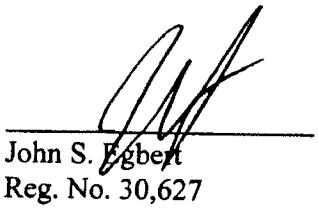
ATTORNEY FOR REGISTRANT
NOVATECH SA

CERTIFICATE OF SERVICE

I hereby certify that Registrant's Response to Petitioner's Second Set of Interrogatories is being sent by first class mail on this 13th day of December 2006 to the attorney of record for Petitioner at the following address:

Daniel G. Jarcho
Andrew J. Park
McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500
(202) 496-7756 fax

ATTORNEYS FOR PETITIONER
BRYAN CORPORATION



John S. Egbert
Reg. No. 30,627
Egbert Law Offices
412 Main Street, 7th Floor
Houston, Texas 77002
(713)224-8080
(713)223-4873 (Fax)

ATTORNEY FOR REGISTRANT
NOVATECH SA

EXHIBIT D

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

MBA

Mailed: October 3, 2007

Cancellation No. 92046037

Bryan Corporation

v.

Novatech SA

Michael B. Adlin, Interolocutory Attorney:

This case now comes up for consideration of respondent's motion to compel responses to its first and second set of requests for production, filed March 5, 2007, and petitioner's motion to compel discovery responses, filed March 7, 2007. Each party opposes the other's motion to compel.[1]

Background

The parties' motions to compel each require us to consider certain regulations and actions of the U.S. Food

[1] Respondent's request for a telephone conference was only made at the very end of its motion. The request is denied as the parties' motions to compel in this case are not appropriate for a telephone conference, and in any event have been fully briefed. The parties are directed to the Board's notice regarding telephone conferences, available on its Web site: http://www.uspto.gov/web/offices/com/sol/og/2000/week25/pattele.htm.

and Drug Administration ("FDA"), and the impact, if any, of those regulations and actions on discovery in this proceeding. Therefore, it is necessary to briefly consider the FDA-related allegations at issue in this proceeding.

In its petition for cancellation, petitioner alleges that respondent's registration of the mark STERITALC for certain pharmaceutical products should be cancelled because it was procured by fraud. According to petitioner, respondent declared in its intent to use application for registration of STERITALC that it "believed it was entitled to use the mark in commerce," but, according to petitioner, respondent "did not then and still has not obtained [the allegedly required] approval from [the FDA] to distribute its product in commerce or to use the name STERITALC." Petitioner further alleges that respondent's mark STERITALC is likely to be confused with petitioner's mark STERILE TALC POWDER, that petitioner has priority of use and that petitioner would be damaged by the continued registration of respondent's mark. While respondent denies the salient allegations in the petition for cancellation, its motion to compel also alleges that FDA regulations and actions are relevant to this proceeding.

Respondent's Motion to Compel

In its motion to compel, respondent makes several relatively specific claims about the alleged deficiencies in

petitioner's discovery responses. First, respondent claims that "[p]etitioner argues throughout its Petition for Cancellation that it is the sole holder of common law trademark rights to the term STERILE TALC POWDER based on the [FDA] approval of a drug with such a name," but "[p]etitioner has failed to produce, among other things, all documents and things dealing with the FDA approval of its two New Drug Applications ("NDA") for sterile talc powder products." Next, respondent asserts that petitioner should produce "documents evidencing the business relationship and the joint venture pursued by Petitioner and Registrant," as well as "information regarding the use of the term STERILE TALC POWDER within [petitioner's] SCLEROSOL" NDA. Finally, respondent claims that petitioner should produce documents relating to the FDA's "label detail requirements," and documents "showing the generic name of Petitioner's SCLEROSOL product."

Respondent also makes an unexplained, general claim that "Petitioner has not produced all documents responsive to [Document Request Nos.] 3, 25, 30, 33, 35 and 37" in respondent's First Set of Requests for Production. These requests for production seek documents relating to petitioner's adoption and use of STERILE TALC POWDER, the "language or word origin" of the mark, actual confusion between the parties' marks and "any inquiry investigation,

or survey" conducted by petitioner relating to this proceeding.

In its opposition to the motion to compel, petitioner claims that the requests for documents relating to the NDAs for STERILE TALC POWDER and SCLEROSOL are "overly broad," unduly burdensome, irrelevant and not likely to lead to the discovery of relevant admissible information. Specifically, petitioner disputes respondent's assertion that the petition for cancellation is based on the FDA's approval of petitioner's products. Rather, petitioner argues, the petition for cancellation is based on fraud and likelihood of confusion between STERILE TALC POWDER and STERITALC. Petitioner's claim of common law rights in STERILE TALC POWDER is based on use of the mark in commerce, not FDA approval, and "FDA approval is only a necessary prerequisite to use in commerce, not use in commerce *per se*." Petitioner also claims that the mark SCLEROSOL "is not relevant" to this proceeding. Finally, petitioner argues that it has produced all documents in its possession, or that it has no responsive, non-privileged documents, related to the adoption and use of STERILE TALC POWDER, "the FDA's approval of the STERILE TALC POWDER mark," actual confusion, the parties' prior business relationship or any "inquiry, investigation or survey" concerning this proceeding.

In its reply, respondent argues that whether or not the petition for cancellation is "based on" FDA approval of STERILE TALC POWDER, "it is undeniable that Petitioner has claimed 'superior common law right to use of the STERILE TALC POWDER,' and that such a right was allegedly received only after FDA approval of the STERILE TALC POWDER NDA." Respondent also claims that SCLEROSOL is relevant to this procdeeding because, as illustrated by the FDA's Web site, "the generic name for [SCLEROSOL] is 'sterile talc powder,'" and "evidence showing 'sterile talc powder' is the generic name of Petitioner's SCLEROSOL drug is quite relevant in determining whether Petitioner holds an alleged common law interest."

Petitioner's Motion to Compel

In its motion to compel, petitioner argues that respondent has failed to produce information and documents, which, petitioner alleges, are relevant to petitioner's fraud claim. Specifically, petitioner alleges that respondent failed to adequately respond to discovery requests concerning the FDA approval process for respondent's drug sold under the mark STERITALC.

According to petitioner, "only *lawful* use in commerce is recognized by the PTO as a basis for granting trademark rights," and "for the use of a drug such as STERITALC to be lawful it must comply with the Federal Food, Drug and

Cosmetic Act ("FDCA")." Therefore, petitioner alleges, respondent "improperly failed to produce" documents and information relating to the FDA's denial of respondent's request to market and sell STERITALC (First Set of Interrogatories, No. 4 and First Set of Document Requests, No. 1). Petitioner also alleges that given respondent's assertion that it distributed STERITALC under an Investigational New Drug Application ("IND") procedure in 1996, respondent failed to adequately respond to discovery requests "regarding the details of any STERITALC clinical investigation, treatment IND, or treatment protocol" (Third Set of Document Requests Nos. 1, 5-7, and Third Set of Interrogatories Nos. 1, 3). Petitioner claims that respondent failed to produce information or documents "regarding sale of STERITALC" in the U.S. or regarding respondent's "use of the STERITALC mark and label in U.S. commerce" (Second Set of Interrogatories Nos. 2, 4, Third Set of Document Requests Nos. 2-4, 8, 10 and 11, Third Set of Interrogatories Nos. 2, 4, 5, 9, 11). Finally, petitioner argues that respondent improperly objected to its interrogatory concerning respondent's stated belief in its trademark application that it is entitled to use STERITALC (Second Set of Interrogatories No. 5).

In response to petitioner's motion, respondent argues that "[t]he FDA denial of Registrant's NDA [in 1997] is not

at issue in this case since the STERITALC mark was filed under 66(A) on a bona fide intent-to-use basis" in 2004. Respondent also argues that petitioner's requests for information and documents concerning the 1996 IND procedure constitute a "fishing expedition" for material which "could only be relevant for use in a forum other than this" Board proceeding. Finally, respondent alleges that its answer to the petition for cancellation and responses to petitioner's interrogatories adequately answer petitioner's Second Set of Interrogatories No. 5, which concerns respondent's stated belief in its trademark application that it is entitled to use STERITALC.

In reply, petitioner argues that information related to respondent's NDA and the IND procedure for STERITALC is reasonably calculated to lead to the discovery of admissible evidence, because even though respondent's application for registration was based on an intent to use the mark, respondent represented to the Office that "it had the 'right to use' STERITALC in commerce." According to petitioner, respondent's "understanding of FDA rules is indisputably relevant to whether [respondent] knew, at the time it declared otherwise, that it did not have the right to use STERITALC in commerce." Petitioner also alleges that respondent has not adequately responded to petitioner's Second Set of Interrogatories No. 5.

Decision

Because each party argues that the FDA's approval, or lack of approval, of the parties' marks and pharmaceutical products is relevant, we must first consider the impact of FDA decisions on Board proceedings. The issue has been addressed before. See, General Mills Inc. v. Health Valley Foods, 24 USPQ2d 1270 (TTAB 1992); Kellogg Co. v. New Generation Foods, Inc., 6 USPQ2d 2045 (TTAB 1988); Clorox Co. v. Armour-Dial, Inc., 214 USPQ 850 (TTAB 1982); Santinine Societa v. P.A.B. Produits, 209 USPQ 958 (TTAB 1981).

As a preliminary matter, as petitioner points out in its motion to compel, "for the use of a drug such as STERITALC to be lawful it must comply with the Federal Food, Drug, and Cosmetic Act ("FDCA")."

> It has been the consistent position of this Board and the policy of the Patent and Trademark Office that a "use in commerce" means a "lawful use in commerce," and the shipment of goods in violation of federal statute, including the [FDCA], may not be recognized as the basis for establishing trademark rights.

Clorox Co., 214 USPQ at 851. Therefore, evidence that either party offered its product in violation of the FDCA could be relevant to the allegations and defenses in this proceeding.

However, "[t]he PTO and FDA reviews [of pharmaceutical trademarks] serve two fundamentally different purposes." J.

Thomas McCarthy, Trademarks and Unfair Competition § 19:150 (4th ed. 2007). Furthermore, because the Board has "little or no familiarity" with the FDCA or other federal regulatory acts over which it does not have jurisdiction, "there is a serious question as to the advisability of our attempting to adjudicate whether a party's use in commerce is in compliance with the particular regulatory act or acts which may be applicable thereto." Santinine, 209 USPQ at 964. Accordingly,

> the better practice in trying to determine whether use of a mark is lawful under one or more of the myriad regulatory acts is to hold a use in commerce unlawful only when the issue of compliance has previously been determined (with a finding of noncompliance) by a court or government agency having competent jurisdiction under the statute involved, or where there has been a per se violation of a statute regulating the sale of a party's goods.

General Mills, 24 USPQ2d at 1273.

In this case, we note that neither party has submitted evidence of a previous determination of noncompliance by the FDA with respect to use of either party's mark. Nor has either party submitted evidence of a per se violation of the FDCA or other regulatory statute or rule. Therefore, we cannot on the record before us compel responses to discovery requests concerning FDA regulations or actions, given that this is a proceeding concerning only whether the STERITALC trademark registration should be cancelled.

Turning first to respondent's motion to compel, and pursuant to the discussion above, we **DENY** respondent's motion to compel petitioner to produce additional information or documents regarding FDA review, approval or communications concerning: (1) NDAs for sterile talc powder products; (2) STERILE TALC POWDER; (3) SCLEROSOL; and/or (4) "label detail requirements." Our denial encompasses respondent's request that petitioner be compelled to produce "documents showing the generic name of Petitioner's SCLEROSOL product."

Furthermore, with respect to respondent's First Request for Production Nos. 3, 25, 30 and 37, petitioner "submits that it possesses no additional documents responsive" to these requests, and accordingly respondent's motion to compel additional information or documents concerning the parties' prior agreements or relationship, petitioner's adoption and use of its mark, the word origin of petitioner's mark or actual confusion, is **DENIED**.[2]

Petitioner claims that it has no documents responsive to respondent's First Request for Production No. 33 which are not protected by the attorney work product doctrine.

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[2] Of course, either party may seek to preclude the other from relying on information or documents which should have been produced in response to valid discovery requests, but were not, on this or any other topic. See, Presto Products v. Nice-Pak Products, 9 USPQ2d 1895, 1896 n. 5 (TTAB 1988).

Accordingly, respondent's motion to compel the production of documents responsive to this request is **DENIED**. However, the parties are required to serve on each other a proper privilege log pursuant to Fed. R. Civ. P. 26(b)(5) for any documents withheld based on the attorney-client privilege or attorney work product doctrine.

Finally, because the stipulated protective order filed with the Board on November 30, 2006 is now in effect, to the extent that petitioner withheld any documents based solely on its objection that the documents are proprietary or confidential, those documents must be produced in accordance with the protective order.

Turning next to petitioner's motion to compel, and pursuant to the discussion above, we **DENY** petitioner's request that respondent be compelled to produce documents or information related to: (1) any NDA; (2) any IND; (3) the FDA's approval or denial of respondent's request to market or sell STERITALC; and/or (4) any STERITALC clinical investigation or treatment protocol. This denial encompasses petitioner's request that respondent be compelled to reply more fully to petitioner's First Set of Document Requests No. 1, First Set of Interrogatories No. 4, Third Set of Document Requests Nos. 1, 2-4, 5-8, 10 and 11, and Third Set of Interrogatories Nos. 1-5, 9 and 11.

Petitioner's motion to compel a substantive response to its Second Set of Interrogatories Nos. 2 and 4 is **DENIED**, because sales made under, and specimens submitted in connection with, respondent's cancelled Registration No. 2116833 are not relevant to this proceeding, which involves only Registration No. 3093389.

Finally, petitioner's motion to compel a substantive response to its Second Set of Interrogatories No. 5 is **GRANTED**, and respondent's objection to the interrogatory as calling for a "legal conclusion" is **OVERRULED**. See, Johnston Pump/General Valve Inc. v. Chromalloy American Corp., 10 USPQ2d 1671, 1676 (TTAB 1989).

Conclusion

Respondent's motion to compel is **DENIED**. Petitioner's motion to compel is **GRANTED** with respect to its Second Set of Interrogatories No. 5, but otherwise **DENIED**. The parties are required to serve on each other proper privilege logs pursuant to Fed. R. Civ. P. 26(b)(5) for any documents withheld based on the attorney-client privilege or attorney work product doctrine. To the extent that either party withheld documents based solely on a confidentiality objection, those documents must be produced in accordance with the stipulated protective agreement in effect in this proceeding.

Proceedings herein are resumed, and trial dates are reset as follows[3]:

Discovery to Close:	CLOSED
30-day testimony period for party in position of plaintiff to close:	January 1, 2008
30-day testimony period for party in position of defendant to close:	March 1, 2008
15-day rebuttal testimony period to close:	April 15, 2008

***

[3] Petitioner's motion to extend the testimony period, filed March 8, 2007, will not be further considered, inasmuch as we consider the filing of respondent's motion to compel on March 5, 2005 to have effectively tolled the running of this proceeding.

EXHIBIT E

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Registration No. 3,093,389
Registered on: May 16, 2006

BRYAN CORPORATION,	§	
	§	
Petitioner,	§	
	§	
v.	§	Cancellation No. 92046037
	§	
NOVATECH SA,	§	
	§	
Registrant.	§	

REGISTRANT'S SUPPLEMENTAL ANSWERS TO PETITIONER'S SECOND SET OF INTERROGATORIES

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, NOVATECH SA ("Registrant"), by its attorneys, hereby submits the following objections and supplemental answers to BRYAN CORPORATION'S ("Petitioner") Second Set of Interrogatories as follows:

GENERAL OBJECTIONS

1. Registrant objects to Petitioner's Interrogatories to the extent they seek information subject to the attorney/client privilege, or within the attorney's work product immunity, or other grounds of immunity from discovery.

2. Registrant objects to Petitioner's Interrogatories to the extent they seek information that is unreasonably cumulative, duplicative, or obtainable from some other source that is more convenient, less burdensome, or less expensive.

3. Registrant objects to Petitioner's Interrogatories to the extent that the burden or expense of the Interrogatory outweighs its likely probative value.

4. Registrant's responses are based upon information and writings presently available to and located by Registrant and its attorneys. Registrant has not completed its investigation of the facts relating to this Cancellation, its discovery in this action, nor its preparation for trial. All the information supplied is based only on such information and documents which are presently and specifically known to Registrant. Therefore, Registrant's written responses are without prejudice to its rights to supplement or amend its written responses and to present evidence discovered hereafter at any hearing or trial.

5. Registrant objects to Petitioner's Interrogatories instructions and definitions to the extent they seek to impose burdens contrary to or in addition to those provided in the Federal Rules of Civil Procedure or the Trademark Rules of Practice. Accordingly, Registrant will produce documents identified in its responses in accordance with the applicable rules.

INTERROGATORIES

1. State whether you have ever, at any time in the past or present, sold a drug in the United States that bears the name STERITALC.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Without waving these objections or any others, Registrant responds that Registrant sold aerosol STERITALC in the United States under Investigational New Drug Application (IND) procedure in 1996.

2. If you have ever sold, at any time in the past or present, a drug bearing the name STERITALC in the United States, identify the drug, state whether the drug was approved by the

Food and Drug Administration (FDA), state the period of the sales, the dollar amount of the sales, the number of units of drugs sold, and identify the purchasers.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery of this Cancellation proceeding. Without waving these objections or any others, Registrant responds that Registrant sold aerosol STERITALC in the United States under an Investigational New Drug Application (IND) procedure in 1996. Registrant used the IND procedure to sell STERITALC brand aerosol sterile talc powder with permission from the FDA Division of Oncology. The FDA allowed registrant to send hospitals two canisters of STERITALC brand aerosol sterile talc powder per patient if a physician faxed a request to the FDA. The FDA would then assign an IND number to each request. Registrant's central file number for its facilities was number 9613846. The FDA labeler code number for Registrant was No. 62327. The FDA assigned LI 0060295 as the Drug Product Listing number for STERITALC on Registrant's form FDA 2657.

3. State whether you believe it is lawful to sell the STERITALC drug in the U.S. without FDA approval.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner.

4. State whether the drug label you submitted as evidence of the use of the STERITALC mark in connection with application Serial No. 75/076,198 is a sample of a label that was affixed to drugs sold in U.S. commerce.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner.

5. State whether your belief that you are "entitled to use" the STERITALC mark in commerce, as set forth in the Declaration you signed in connection with your application Serial No. 79/008,374, means that on the date of the Declaration you believed you have the right to sell a drug that bears the name STERITALC in U.S. commerce.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for information that is protected by the Attorney/Client privilege. Without waving these objections or any others, the STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration. Registrant signed a Declaration in connection with application Serial No. 79/008,374. The Declaration meant that Registrant "believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive." Registrant relies solely on the statement as it is written in the Declaration contained within the application.

6. State whether your belief that you are "entitled to use" the STERITALC mark in commerce, as set forth in the Declaration you signed in connection with your application Serial No. 79/008,374, [illegible] Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration.

7. Identify and describe the facts and documents upon which you will rely to support your response to Interrogatory Nos. 6 and 7.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The STERITALC mark was filed under 66(a) as an intent to use application and was based on International Registration No. 0667961.

8. State whether it is your contention that the STERITALC mark can be used in U.S. commerce under the Lanham Act without FDA approval of the STERITALC drug.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. The interrogatory calls for information that is protected by the Attorney/Client privilege. Without waving these objections or any others, Registrant responds the STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration. Registrant

plans to obtain approval of the STERITALC drug by the FDA before using the STERITALC mark in U.S. commerce.

9. If it is your contention that the STERITALC mark can be used in U.S. commerce under the Lanham Act without FDA approval of the STERITALC drug, state how the STERITALC mark can be used in U.S. commerce.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. The interrogatory calls for information that is protected by the Attorney/Client privilege. Without waving these objections or any others, Registrant responds the STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration. Registrant plans to obtain approval of the STERITALC drug by the FDA before using the STERITALC mark in U.S. commerce.

10. State whether you made any inquiry at any time prior to the filing of your application Serial No. 79/008,374 to determine whether there may be any obstacles to the FDA approval of the STERITALC drug.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery. Without waving these objections or any others, Registrant

responds the STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration. Registrant plans to obtain approval of the STERITALC drug by the FDA before using the STERITALC mark in U.S. commerce and expects to obtain such approval without any problems.

11. State whether you currently have a pending FDA application for the STERITALC drug.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for information that is protected by the Attorney/Client privilege. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery. Without waving these objections or any others, Registrant responds that there is not a pending FDA application for the STERITALC drug as of the date of this Answer to Interrogatories.

12. State whether you were aware, on the date you signed the Declaration in connection with your application Serial No. 79/008,374 that Bryan Corporation had an approved NDA for STERILE TALC POWDER.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery. Without waving these objections or any others, Registrant responds that it did not learn of an approved NDA for Petitioner's sterile talc powder in a vial until after its December 28, 2004 filing date for STERITALC in International Class 005.

13. State whether you conducted an availability search to determine if any third parties have registered and/or are using a mark in the U.S. that is the same or similar to the STERITALC mark prior to the filing date of your application Serial No. 79/008,374.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege.

14. Identify and describe any and all correspondence between the FDA and you in connection with your April 17, 1997 FDA application and in connection with any other FDA applications for the STERITALC drug.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery. Without waving these objections or any others, please refer to Registrant's Responses to Petitioner's Second Set of Requests for Production.

15. Identify and describe the facts and documents upon which you will rely to support each of your three (3) affirmative defenses to the Petition to Cancel as stated in your Answer.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. Also, The interrogatory is an improper attempt to

require Registrant to list all factual assertions or contentions in this case, marshal all of its available proof, or marshal all proof Registrant intends to offer.

16. Identify and describe the facts and documents upon which you will rely to support your denial of the allegations in Paragraph 12 of the Petition to Cancel.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. Also, The interrogatory is an improper attempt to require Registrant to list all factual assertions or contentions in this case, marshal all of its available proof, or marshal all proof Registrant intends to offer.

Respectfully submitted,

November 5, 2007
Date

John S. Egbert
Reg. No. 30,627
Egbert Law Offices
412 Main St., 7th Floor
Houston, Texas 77002
(713)224-8080
(713)223-4873 fax

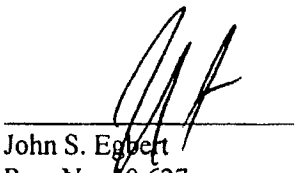
ATTORNEY FOR REGISTRANT
NOVATECH SA

CERTIFICATE OF SERVICE

record for Petitioner at the following address:

Daniel G. Jarcho
Andrew J. Park
McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500
(202) 496-7756 fax

ATTORNEYS FOR PETITIONER
BRYAN CORPORATION



John S. Egbert
Reg. No. 30,627
L. Jeremy Craft
Egbert Law Offices, PLLC
412 Main Street, 7th Floor
Houston, Texas 77002
(713)224-8080
(713)223-4873 (Fax)

ATTORNEY FOR REGISTRANT
NOVATECH SA

JSE:ksw
Our File: 1811-71

VERIFICATION

I, Bruno Ferreyrol, officer for Registrant Novatech SA, hereby declare that I have read the foregoing Registrant's Supplemental Response to Petitioner's Second Set of Interrogatories (Nos. 1 to 16), and know the contents thereof; that said responses were prepared with the assistance and advice of counsel, upon which I have relied; that the responses set forth herein, subject to inadvertent or undiscovered errors, are based on and therefore necessarily limited by the records and information still in existence, presently recollected, and thus far discovered in the course of the preparation of the responses; that consequently, Registrant reserves the right to make any changes in its responses if it appears at any time that omissions or errors have been made therein or that more accurate information is available; and that based upon the foregoing, the undersigned declares that to the best of his knowledge, information and belief, the foregoing answers are true and correct.

DATED this 31st day of OCTOBER, 2007.

By: Bruno Ferreyrol

Title: Executive Director

Name: Ferreyrol, Bruno

Address: Novatech S.A.

1058 Voie Antiope - Zi Athélia 3

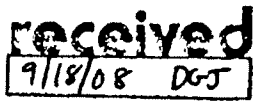
F - 13705 LA CIOTAT CEDEX

Our File: 1811-71

EXHIBIT F

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Registration No. 3,093,389
Registered on: May 16, 2006

BRYAN CORPORATION,	§	
	§	
Petitioner,	§	
	§	
v.	§	Cancellation No. 92046037
	§	
NOVATECH SA,	§	
	§	
Registrant.	§	

REGISTRANT'S SECOND SUPPLEMENTAL ANSWERS TO PETITIONER'S SECOND SET OF INTERROGATORIES

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, NOVATECH SA ("Registrant"), by its attorneys, hereby submits the following objections and supplemental answers to BRYAN CORPORATION'S ("Petitioner") Second Set of Interrogatories as follows:

GENERAL OBJECTIONS

1. Registrant objects to Petitioner's Interrogatories to the extent they seek information subject to the attorney/client privilege, or within the attorney's work product immunity, or other grounds of immunity from discovery.

2. Registrant objects to Petitioner's Interrogatories to the extent they seek information that is unreasonably cumulative, duplicative, or obtainable from some other source that is more convenient, less burdensome, or less expensive.

3. Registrant objects to Petitioner's Interrogatories to the extent that the burden or expense of the Interrogatory outweighs its likely probative value.

4. Registrant's responses are based upon information and writings presently available to and located by Registrant and its attorneys. Registrant has not completed its investigation of the facts relating to this Cancellation, its discovery in this action, nor its preparation for trial. All the information supplied is based only on such information and documents which are presently and specifically known to Registrant. Therefore, Registrant's written responses are without prejudice to its rights to supplement or amend its written responses and to present evidence discovered hereafter at any hearing or trial.

5. Registrant objects to Petitioner's Interrogatories instructions and definitions to the extent they seek to impose burdens contrary to or in addition to those provided in the Federal Rules of Civil Procedure or the Trademark Rules of Practice. Accordingly, Registrant will produce documents identified in its responses in accordance with the applicable rules.

INTERROGATORIES

1. State whether you have ever, at any time in the past or present, sold a drug in the United States that bears the name STERITALC.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Without waving these objections or any others, Registrant responds that Registrant sold aerosol STERITALC in the United States under Investigational New Drug Application (IND) procedure in 1996.

2. If you have ever sold, at any time in the past or present, a drug bearing the name STERITALC in the United States, identify the drug, state whether the drug was approved by the

Food and Drug Administration (FDA), state the period of the sales, the dollar amount of the sales, the number of units of drugs sold, and identify the purchasers.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery of this Cancellation proceeding. Without waving these objections or any others, Registrant responds that Registrant sold aerosol STERITALC in the United States under an Investigational New Drug Application (IND) procedure in 1996. Registrant used the IND procedure to sell STERITALC brand aerosol sterile talc powder with permission from the FDA Division of Oncology. The FDA allowed registrant to send hospitals two canisters of STERITALC brand aerosol sterile talc powder per patient if a physician faxed a request to the FDA. The FDA would then assign an IND number to each request. Registrant's central file number for its facilities was number 9613846. The FDA labeler code number for Registrant was No. 62327. The FDA assigned LI 0060295 as the Drug Product Listing number for STERITALC on Registrant's form FDA 2657.

3. State whether you believe it is lawful to sell the STERITALC drug in the U.S. without FDA approval.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner.

4. State whether the drug label you submitted as evidence of the use of the STERITALC mark in connection with application Serial No. 75/076,198 is a sample of a label that was affixed to drugs sold in U.S. commerce.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner.

5. State whether your belief that you are "entitled to use" the STERITALC mark in commerce, as set forth in the Declaration you signed in connection with your application Serial No. 79/008,374, means that on the date of the Declaration you believed you have the right to sell a drug that bears the name STERITALC in U.S. commerce.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for information that is protected by the Attorney/Client privilege. Without waving these objections or any others, Registrant's response is yes.

6. State whether your belief that you are "entitled to use" the STERITALC mark in commerce, as set forth in the Declaration you signed in connection with your application Serial No. 79/008,374, means that on the date of the Declaration you believed you possess ownership of the name STERITALC.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration.

7. Identify and describe the facts and documents upon which you will rely to support your response to Interrogatory Nos. 6 and 7.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The STERITALC mark was filed under 66(a) as an intent to use application and was based on International Registration No. 0667961.

8. State whether it is your contention that the STERITALC mark can be used in U.S. commerce under the Lanham Act without FDA approval of the STERITALC drug.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. The interrogatory calls for information that is protected by the Attorney/Client privilege. Without waving these objections or any others, Registrant responds the STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration. Registrant plans to obtain approval of the STERITALC drug by the FDA before using the STERITALC mark in U.S. commerce.

9. If it is your contention that the STERITALC mark can be used in U.S. commerce under the Lanham Act without FDA approval of the STERITALC drug, state how the STERITALC mark can be used in U.S. commerce.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. The interrogatory calls for information that is protected by the Attorney/Client privilege.

Without waving these objections or any others, Registrant responds the STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration. Registrant plans to obtain approval of the STERITALC drug by the FDA before using the STERITALC mark in U.S. commerce.

10. State whether you made any inquiry at any time prior to the filing of your application Serial No. 79/008,374 to determine whether there may be any obstacles to the FDA approval of the STERITALC drug.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery. Without waving these objections or any others, Registrant responds the STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration. Registrant plans to obtain approval of the STERITALC drug by the FDA before using the STERITALC mark in U.S. commerce and expects to obtain such approval without any problems.

11. State whether you currently have a pending FDA application for the STERITALC drug.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for information that is protected by the Attorney/Client privilege. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this

interrogatory on the grounds that it seeks information that is beyond proper scope of discovery. Without waving these objections or any others, Registrant responds that there is not a pending FDA application for the STERITALC drug as of the date of this Answer to Interrogatories.

12. State whether you were aware, on the date you signed the Declaration in connection with your application Serial No. 79/008,374 that Bryan Corporation had an approved NDA for STERILE TALC POWDER.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery. Without waving these objections or any others, Registrant responds that it did not learn of an approved NDA for Petitioner's sterile talc powder in a vial until after its December 28, 2004 filing date for STERITALC in International Class 005.

13. State whether you conducted an availability search to determine if any third parties have registered and/or are using a mark in the U.S. that is the same or similar to the STERITALC mark prior to the filing date of your application Serial No. 79/008,374.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege.

14. Identify and describe any and all correspondence between the FDA and you in connection with your April 17, 1997 FDA application and in connection with any other FDA applications for the STERITALC drug.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. The interrogatory cannot be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Petitioner. Registrant objects to this interrogatory on the grounds that it seeks information that is beyond proper scope of discovery. Without waving these objections or any others, please refer to Registrant's Responses to Petitioner's Second Set of Requests for Production.

15. Identify and describe the facts and documents upon which you will rely to support each of your three (3) affirmative defenses to the Petition to Cancel as stated in your Answer.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. Also, The interrogatory is an improper attempt to require Registrant to list all factual assertions or contentions in this case, marshal all of its available proof, or marshal all proof Registrant intends to offer.

16. Identify and describe the facts and documents upon which you will rely to support your denial of the allegations in Paragraph 12 of the Petition to Cancel.

ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for a legal conclusion. The interrogatory calls for information that is protected by the Attorney/Client privilege. Also, The interrogatory is an improper attempt to require Registrant to list all factual assertions or contentions in this case, marshal all of its available proof, or marshal all proof Registrant intends to offer.

Respectfully submitted,

9-15-08

Date

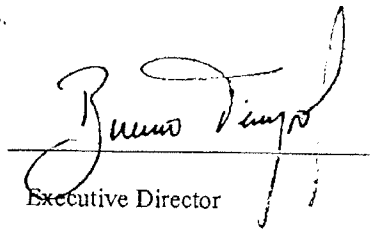
John S. Egbert
Reg. No. 30,627
L. Jeremy Craft
Kevin S. Wilson
Egbert Law Offices, PLLC
412 Main St., 7th Floor
Houston, Texas 77002
(713)224-8080
(713)223-4873 fax

ATTORNEY FOR REGISTRANT
NOVATECH SA

VERIFICATION

I, Bruno Ferreyrol, officer for Registrant Novatech SA, hereby declare that I have read the foregoing Registrant's Second Supplemental Response to Petitioner's Second Set of Interrogatories (Nos. 1 to 16), and know the contents thereof; that said responses were prepared with the assistance and advice of counsel, upon which I have relied; that the responses set forth herein, subject to inadvertent or undiscovered errors, are based on and therefore necessarily limited by the records and information still in existence, presently recollected, and thus far discovered in the course of the preparation of the responses; that consequently, Registrant reserves the right to make any changes in its responses if it appears at any time that omissions or errors have been made therein or that more accurate information is available; and that based upon the foregoing, the undersigned declares that to the best of his knowledge, information and belief, the foregoing answers are true and correct.

DATED this 10th day of September, 2008.

By: 

Title: Executive Director

Name: Ferreyrol, Bruno

Address: Novatech S.A.

1058 Voie Antiope - Zi Athélia 3

F - 13705 LA CIOTAT CEDEX

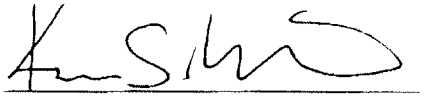
Our File: 1811-71

CERTIFICATE OF SERVICE

I hereby certify that Registrant's Second Supplemental Answer to Petitioner's Second Set of Interrogatories is being sent by first class mail on this 15th day of September 2008 to the attorney of record for Petitioner at the following address:

Daniel G. Jarcho
Andrew J. Park
McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500
(202) 496-7756 fax

ATTORNEYS FOR PETITIONER
BRYAN CORPORATION



John S. Egbert
Reg. No. 30,627
L. Jeremy Craft
Kevin S. Wilson
Egbert Law Offices, PLLC
412 Main Street, 7th Floor
Houston, Texas 77002
(713)224-8080
(713)223-4873 (Fax)

ATTORNEY FOR REGISTRANT
NOVATECH SA

JSE:ksw
Our File: 1811-71

EXHIBIT G

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

MBA

Mailed: August 29, 2008

Cancellation No. 92046037

Bryan Corporation

v.

Novatech SA

Michael B. Adlin, Interlocutory Attorney:

This case now comes up for consideration of respondent's motion for summary judgment, filed November 30, 2007. Petitioner has not substantively responded to respondent's motion, but instead filed a cross-motion, pursuant to Fed. R. Civ. P. 56(f), for discovery which petitioner claims is necessary to respond to respondent's motion for summary judgment.[1] Respondent opposes the cross-motion, which is fully briefed and ready for decision. The delay in acting on it is regretted.

By way of background, respondent requests summary judgment on petitioner's claims of likelihood of confusion

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[1] On November 30, 2007, petitioner filed a motion to compel discovery responses which, because it seeks the same discovery as requested in the cross-motion, is effectively identical to and subsumed by the cross-motion. It will therefore not be further considered.

and fraud, alleging that: (1) petitioner's allegation of standing is based solely on its alleged proprietary rights in the term STERILE TALC POWDER, and because there is no genuine issue of material fact that STERILE TALC POWDER is generic for petitioner's goods, petitioner lacks standing; (2) "it is impossible for there to be a likelihood of confusion" between the mark shown in respondent's registration[2] and petitioner's alleged mark, because petitioner's "mark" is generic; and (3) there is no genuine issue of material fact with respect to petitioner's fraud claim, because petitioner "can offer no evidence" that respondent procured its registration by "false means" or that respondent falsely stated that it believed it was entitled to use its mark in commerce.

In its cross-motion, which is supported by the declaration of petitioner's counsel, petitioner alleges that because respondent "refused to meaningfully respond to one of [petitioner's] proper discovery requests, [petitioner] has not been able to fully develop the factual record with respect to [petitioner's] fraud claim, on which [respondent] has moved for summary judgment." Specifically, petitioner claims that respondent's response to petitioner's Second Set

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[2] Registration No. 3093389, issued May 16, 2006 under Section 66(a), for STERITALC, in standard characters, for use in connection with "Pharmaceutical products containing talcum powder, namely, pharmaceutical preparations containing talcum powder for the treatment of malignant pleural effusions …."

of Interrogatories No. 5 is insufficient, even though the Board's order of October 3, 2007 overruled respondent's objection to this interrogatory and compelled respondent to respond to it. The interrogatory and respondent's supplemented response to it are as follows:

> 5. State whether your belief that you are "entitled to use the STERITALC mark in commerce, as set forth in the Declaration you signed in connection with your application Serial No. 79/008,374, means that on the date of the Declaration you believed you have the right to sell a drug that bears the name STERITALC in U.S. commerce.
>
> ANSWER: Registrant incorporates by this reference the general objections set forth above. In addition, the interrogatory calls for information that is protected by the Attorney/Client privilege. Without waiving these objections or any others, the STERITALC mark was filed under 66(a) as an intent to use application and was based on an international registration. Registrant signed a Declaration in connection with application Serial No. 79/008,374. The Declaration meant that Registrant "believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive." Registrant relies solely on the statement as it is written in the Declaration contained within the application."

As explained in the Board's order of October 3, 2007, petitioner's fraud claim is based on the theory that because respondent did not have approval from the U.S. Food and Drug Administration ("FDA") to sell its goods under the mark

STERITALC, its declaration that it is entitled to use the mark in commerce, submitted in support of its application for registration, was fraudulent. See also, Petition for Cancellation ¶ 13 (respondent procured its registration by fraud, in "falsely alleging in a Declaration that Registrant believed it was entitled to use the mark in commerce, when Registrant did not then and still has not obtained approval from FDA to distribute its product in commerce or to use the name STERITALC."). Petitioner claims that "because information directed at [respondent's] state of mind is essential to [petitioner's] fraud claim (intent is an element of fraud) and because such information is exclusively within [respondent's] control, [petitioner] cannot meaningfully respond to [respondent's] Motion for Summary Judgment without first receiving [respondent's] adequate response to [petitioner's] contention interrogatory."

In its response to the cross-motion, respondent contends that its supplemental response to the interrogatory in question "complied with the Board's Order" of October 3, 2007. While not disputing that it did not specifically respond to the question posed in the interrogatory, respondent alleges that "[i]n the interrogatory, Petitioner has taken the term 'entitled to use,' a term of art in trademark law, and proceeds to supply an erroneous legal

definition [presumably the "right to sell"] to that term of art." In any event, respondent claims that its "supplemental answer to Petitioner's interrogatory makes it clear what [respondent's] state of mind was when filing its declaration." Finally, respondent claims that "the primary contention of its Motion for Summary Judgment is the issue of standing ... If Petitioner is found to lack standing, the Board will not be required to make a decision on the issues of likelihood of confusion or fraud."

In order to establish that it is entitled to discovery under Fed. R. Civ. P. 56(f), petitioner must show through affidavit (in this case the declaration of its counsel) that it "cannot for reasons stated present by affidavit facts essential to justify" its opposition to respondent's motion. See, Keebler Co. v. Murray Bakery Products, 866 F.2d 1386, 1389, 9 USPQ2d 1736, 1739 (Fed. Cir. 1989). Petitioner must do more than set forth a "speculative hope of finding some evidence" that would support its arguments, however. Sweats Fashions, Inc. v. Pannill Knitting Co. Inc., 833 F.2d 1560, 1566-67, 4 USPQ2d 1793, 1799 (Fed. Cir. 1987); Pure Gold, Inc. v. Syntex (U.S.A.), Inc., 739 F.2d 624, 222 USPQ 741 (Fed. Cir. 1984). Rather, petitioner "should set forth with specificity the areas of inquiry needed to obtain the information necessary to enable" it to respond to the motion for summary judgment. TBMP § 528.06 (2d ed. rev. 2004).

"Unfocused requests" for discovery which lack specificity are not sufficient under Fed. R. Civ. P. 56(f). Keebler, 866 F.2d at 1390, 9 USPQ2d at 1739.

As a preliminary matter, we note that the Board's order of October 3, 2007 required respondent to respond to the interrogatory in question. While respondent provided a "response," in the sense that it did not merely object to the interrogatory, and instead provided a purported answer, it was not proper for respondent to essentially interpret the interrogatory as invalid and on that basis refuse to provide a real response to the question posed, after being ordered to serve a response. Indeed, if the interrogatory was found to be invalid when the Board reviewed it the first time, respondent would not have been compelled to respond to it.

In any event, petitioner has established that it is entitled to an actual response to the question actually posed in the interrogatory. First, and most importantly, while respondent's motion for summary judgment is primarily based on respondent's allegation that petitioner lacks standing, it is also based on respondent's claim that petitioner cannot come forward with evidence to support its fraud claim. As petitioner points out, the information responsive to the interrogatory in question directly relates to the fraud claim, and is uniquely within respondent's

control. Second, petitioner's request for discovery under Rule 56(f) is nothing if not specific and focused. Petitioner seeks a single response to a single interrogatory. Respondent has already been ordered to respond to the interrogatory, and failed to do so. For these reasons, petitioner's cross-motion is **GRANTED**, and respondent is allowed until **FIFTEEN DAYS** from the mailing date of this order to respond to petitioner's Second Set of Interrogatories No. 5. Petitioner is allowed until **FORTY FIVE DAYS** from the mailing date of this order to file its response to respondent's motion for summary judgment.

To avoid any confusion or further delay, respondent must answer the question posed, and petitioner must respond to respondent's motion for summary judgment, within the time provided herein. Any failure by either party to do this will be at its own peril. To answer the question posed in the interrogatory, respondent must indicate whether it believed, on the date it signed the declaration in question, that it had "the right to sell a drug that bears the name STERITALC in U.S. commerce." It must provide this answer without citing, referring to or quoting its declaration, except that respondent may cite the date on which the declaration was filed. If, as last time, respondent believes the interrogatory is "erroneous," improper, confusing or unclear in any way, it may not so state in its

supplemental response, but must instead initiate a telephone conference with petitioner and the Board to discuss any issues it has with the interrogatory, well prior to the deadline for responding to it. Serving a supplemental response which, like the last one, questions the basis or substance of the interrogatory or refuses to answer the question posed is not permitted and will be grounds upon which petitioner may file a motion for sanctions. By the same token, once respondent complies with this order, petitioner may not seek to further delay responding to the motion for summary judgment, and any attempt to do so will be at its peril. In the event petitioner intends to do anything other than respond to the motion for summary judgment within the time provided, it must initiate a telephone conference with respondent and the Board to discuss its intention, well prior to the deadline for responding to respondent's motion for summary judgment.

Proceedings herein remain otherwise suspended pending disposition of respondent's motion for summary judgment.

News from the TTAB

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:

http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf
http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address: http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm

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